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ALEXANDER L. STEVAS,
CLERK

80-2089

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

JIMMY DELTON PETTY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

WARREN HEAGY
217 West Third Street
Odessa, Texas 79761

ATTORNEY FOR
PETITIONER

QUESTIONS PRESENTED FOR REVIEW

1. Whether a roving border patrolman can stop and detain a motorist traveling upon a rough and lonely public roadway merely because of the nature of the roadway itself, without the officer having observed any specific articulable facts which would lead to a conclusion that the motorist was engaged in any type of illegal activity.

2. Whether or not law enforcement officers can detain a motorist for over one hour and subsequently search his vehicle without having probable cause to justify the detention.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED -i-

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2. Whether or not law enforcement officers can detain a motorist for over one hour and subsequently search his vehicle without having probable cause to justify the detention.

List of Authorities--------- -iv- -vi-

Opinions Below---------- 2

Jurisdiction---------- 3

Statutes Involved---------- 3

Statement of the Case------- 4

Reasons for Granting the Writ 8

A. Importance of the Ouestion---------- 8

B. Judgment Below Conflicts with Applicable Decisions of the Supreme Court-------- 12

Lack of Individualized Suspicion------- 12

Evidence obtained by Illegal Arrest------- 19

C. Conflict with Opinions of Other Circuits-------- 21

LIST OF AUTHORITIES

Cases:	Page
Adams v. Williams, 407 U.S. 143, 92 S.Ct. 1921, 32 L. Ed.2d 612 (1972)---------	14
Almeida-Sanchez v. United States, 413 U.S. 266, 93 S.Ct. 2535, 37 L.Ed.2d 596 (1973)----------	10
Brown v. State of Texas, 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979)----------	19
Camara v. Municipal Court, 387 U.S. 528, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967)----------	10
Delaware v. Prouse, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979)-------	10, 16, 17, 18, 19
Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979)----	13, 20
Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 2d 889 (1968)----------	14, 20, 22

United States v. Brignoni-Ponce, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975)---------- 10, 13, 15, 16, 19, 20

United States v. Carrizoza-Gaxiola, 523 F.2d 239 (Ninth Circuit, 1975)--- 23

United States v. Cortez and Hernandez-Loera, ___ U.S. ___, 101 S.Ct. ___, 66 L.Ed.2d 620 (1981)---------- 19

United States v. Frisbee, 550 F.2d 339 (1977)----- 11

United States v. Martinez-Fuerte, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976)---------- 18

United States v. Petty and Nunez-Quintela, 601 F.2d 883 (1979); cert. denied, ___ U.S. ___, 100 S.Ct. 1649, 64 L.Ed.2d 237 (1980)---------- 4

United States Constitution:	Page
Fourth Amendment--------	3, 8, 12, 13, 17
Statutes:	
18 U.S.C. 5005-5024-----	5
21 U.S.C. 841(a)(1)-----	3, 4, 5
28 U.S.C. 1254(1)-------	3

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IN THE

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JIMMY DELTON PETTY,

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vs.

UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Comes now Petitioner, Jimmy Delton Petty, and respectfully prays that the Honorable Supreme Court of the United States grant to Petitioner a Writ of Certiorari and review the Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit, reverse

the lower Court's Opinion and Render Judgment in favor of Petitioner.

OPINIONS BELOW

The Judgment and Probation/Commitment Order rendered by the Honorable Lucius D. Bunton, United States District Judge for the Western District of Texas, Pecos Division, was rendered on July 15, 1980, and is attached hereto as Appendix A. The Rule 21 Decision of the United States Court of Appeals for the Fifth Circuit was rendered on April 8, 1981, and is attached hereto as Appendix B; and the Per Curiam Opinion of the United States Court of Appeals for the Fifth Circuit denying the Motion for Rehearing was rendered on May 11, 1981, and is attached hereto as Appendix C.

JURISDICTION

The Petitioner herein invokes the jurisdiction of this Honorable Court pursuant to 28 U.S.C. §1254(1):

> "By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

STATUTES INVOLVED

Fourth Amendment to the Constitution of the United States:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

21 U.S.C. §841(a)(1):

> "to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;"

STATEMENT OF THE CASE

Petitioner, Jimmy Delton Petty, was indicted in the United States District Court for the Western District of Texas, Pecos Division, on July 12, 1978, for a violation of 21 U.S. Code §841(a)(1).

The Trial Court granted Petitioner's Motion to Suppress on the 12th day of September, 1978. Subsequent thereto, upon appeal by the United States, the Fifth Circuit reversed the Judgment of the Trial Court on August 23, 1979. The previous opinion of the Fifth Circuit can be found at 601 F.2d 883 (1979). Petitioner, after timely filing Motions for Rehearing, applied for Writ of Certiorari to the Supreme Court of the United States and certiorari was denied on the 14th day of April, 1980. (See Petty-Nunez v. United States, ___ U.S. __, 100 S.Ct. 1649, 64

L.Ed.2d 237 [1980]). Thereafter, on June 26, 1980, Petitioner was found guilty of violating §841(a)(1) of the United States Code. On July 15, 1980, Petitioner was sentenced pursuant to the Federal Youthful Corrections Act, 18 U.S.C. §5005-5024. From this conviction, Petitioner seeks a Writ of Certiorari.

The facts of the case are primarily undisputed. Petitioner was stopped pursuant to a roving border patrol check as he was traveling on a public, but unpaved, road which connected two U.S. highways located in Southwest Texas. The road known as Bullis Gap Road traverses through desolate and rough terrain and Petitioner was stopped on Bullis Gap Road approximately one mile from the road's junction with U.S. 90.

Petitioner was stopped by Border Patrol Officers Fisher and Munoz upon

Border Patrol Officer Pagitt's instructions. Officer Pagitt lived in the area and knew some of the resident owners of ranches located on the 63-mile dirt road.

Officer Pagitt had heard from a superior that on two occasions in the past Bullis Gap Road had been used to circumvent a permanent check point which was operated by the Immigration and Naturalization Service on U. S. 385, a major highway located at the North end of Bullis Gap Road.

Officer Pagitt had enlisted assistance from owners of ranches located on Bullis Gap Road to assist him in the event that non-resident vehicles were noticed traversing Bullis Gap Road. On June 21, 1978, Officer Pagitt received a call from a friend living near Bullis Gap Road and was informed that two vehicles, each containing one person, was proceeding North

on Bullis Gap Road. With only this information, Officer Pagitt made the decision to stop the vehicles and enlisted the assistance of other border patrolmen and a patrolman from the Texas Department of Public Safety. Officer Pagitt's decision to stop the two vehicles was made some two hours prior to his ever visualizing the vehicles in question. Officers proceeded to a position approximately .7 of a mile from the junction of Bullis Gap Road and U.S. 90 and stopped Petitioner's vehicle which was being driven by Petitioner, who was accompanied by a passenger, Joe Martin Nunez-Quintela. (Mr. Nunez-Quintela was acquitted at the trial of Petitioner herein.)

After stopping Petitioner's vehicle, Petitioner and Joe Martin Nunez-Quintela were detained by Officers Fisher, and Munoz for a period of time probably in

excess of twenty minutes before Officer Pagitt arrived at the scene of the stop. Petitioner consented to Officer Pagitt's search of his trunk after Officer Pagitt had arrived at the scene of the stop and had interrogated Petitioner. Petitioner was then required to accompany the officers to the Border Patrol office in Sanderson, Texas, some 17 miles from the point of the stop, where the vehicle's back seat was removed and the officers discovered Mexican sugar sacks containing marihuana.

REASONS FOR GRANTING THE WRIT

A.

IMPORTANCE OF THE QUESTION

The exercise of unrestrained and arbitrary discretion by officers which infringe upon citizens' Fourth Amendment guarantees is not a stranger to this Honorable Court. The stopping and arrest-

ing of motorists traversing public highways without reasonable suspicion and/or probable cause are two questions which confront this Court each term.

Many of the cases which now face federal jurists involve the activities of the Immigration and Naturalizaion Service performing what is commonly termed as "roving border patrol stops". This case involves such a stop. The case further involves the seizure of contraband seized by law enforcement officers after a detention of Petitioner which was not based upon probable cause. The government's position is that Officer Pagitt had reasonable suspicion to stop Petitioner's vehicle because of the characteristics of the area and because two strange cars were reported in tandem appearance on the road which may have in the past been used two

times for the smuggling of illegal aliens.

This Court has consistently insisted that the discretion of the officer in the field be constrained and that the freedom of movement upon public roads by motorists be unimpaired unless and until the officer has individualized suspicion based upon articulable facts that the motorist is guilty of criminal activity. See Almeida-Sanchez v. United States, 413 U.S. 266, 93 S.Ct. 2535, 37 L.Ed.2d 596 (1973); Camara v. Municipal Court, 387 U.S. 528, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967); Delaware v. Prouse, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979); and United States v. Brignoni-Ponce, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607(1975). In Delaware v. Prouse, this Court reiterated its position, insisting upon a quantum of individualized suspicion by condemning the

stopping of motorists based on nothing more than inarticulable hunches.

If the Petitioner's conviction is allowed to stand, then the government has carte blanche authority to stop all vehicles on the thousands of roads which connect to major highways leading to the international borders of the United States merely because the roadways themselves have in the past been used for illegal activities.

Bullis Gap Road does connect on its Northern end to U.S. 385 which is one of the two major arteries leading to the Big Bend National Park. The statistics showing that 332,000 people visited the Big Bend National Park in 1975 (See United States v. Frisbee, 550 F.2d 339 [1977]) emphasize the unreasonableness of the government's position in this case. The check point which the government contends

that Petitioner was seeking to circumvent only netted 385 illegal aliens in the year of 1977. Thus, the government's position in this case is that because Bullis Gap Road had been used on two occasions by alien smugglers seeking to circumvent the check point, each and every vehicle not belonging to a resident owner traveling the public road in question must be connected to criminal activity. Such a position creates an irrebutable presumption which neither Petitioner nor any other motorist could ever overcome. Therefore, Petitioner contends that the Fourth Amendment dictates that a quantum of "observed individualized suspicion" be involved prior to the stopping and restraining of a motorist by an officer in the field.

Further, if the conviction in the instant case is allowed to stand, then law enforcement officers without having ob-

served any type of criminal activity will be allowed to stop, detain, and arrest motorists driving near border areas, and subsequently search their vehicles without reasonable suspicion and probable cause and the fruits from such illegal arrests will be admissible against the motorists at subsequent trials. This is contrary to the Fourth Amendment requirements which this Court recently announced in Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979).

B.

JUDGMENT BELOW CONFLICTS WITH APPLICABLE DECISIONS OF THE SUPREME COURT

LACK OF INDIVIDUALIZED SUSPICION

The landmark case governing roving border patrol stops is United States v. Brignoni-Ponce, supra, which dealt with stops to investigate the presence of illegal immigrants. In reliance on Terry

v. Ohio, supra, and Adams v. Williams, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972), the Supreme Court held that, even in the absence of probable cause to search a vehicle or arrest its occupants, "when an officer's observations lead him reasonably to suspect that a particular vehicle may contain aliens who are illegally in the country, he may stop the car briefly and investigate the circumstances that provoke suspicion." 422 U.S. at 881, 95 S.Ct. at 2580. The standard for conducting such a stop is less stringent than "probable cause to believe the suspects guilty of a crime." Id. at 880, 95 S.Ct. at 2580. Rather, officers on roving patrol may stop vehicles "if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the

vehicles contain aliens who may be illegally in the country." Id. at 884, 95 S.Ct. at 2582.

Petitioner does not deny that this Court in Brignoni-Ponce specifically indicated that the officers could consider the characteristics of the area in which they encounter a vehicle, but in listing the factors which a border patrol officer could consider, the remainder of the factors necessarily involve personal observation of specific facts directed toward the specific suspect or vehicle involved. In pronouncing the necessity for individualized suspicion, this Court held as follows:

> ". . . , [We] hold that when an officer's observations lead him reasonably to suspect that a particular vehicle may contain aliens who are illegally in the country, he may stop the car briefly and investigate the circumstances

that provoke suspicion." (Emphasis added.)

The holding of the Fifth Circuit in the instant case is in direct conflict with the principles that this Court established in Brignoni-Ponce in that Officer Pagitt made up his mind to stop Petitioners' vehicle two hours prior to ever seeing the vehicle in question. Hence, his observations could not have led him to reasonably suspect that the particular vehicle may contain illegal aliens, or be involved in any other type of criminal activity.

In Delaware v. Prouse, supra, this Court has recently recognized the extreme danger in allowing governmental agents to stop those individuals operating or traveling in an automobile on anything less than observable actions creating suspicion, and further insisted that prior to

a motorist's Fourth Amendment rights being violated, the officer have an appropriate factual basis for suspicion directed at a particular automobile. Anyting short thereof in the words of this Court

> ". . . would invite intrusions upon constitutionally guaranteed rights based upon nothing more substantial than inarticulate hunches." Id. at 672.

In Prouse this Court recognized that the stopping of a vehicle on anything less than reasonable suspicion based upon observable facts was the kind of standardless and unconstrained discretion which the Court has observed in previous cases when it insisted that the discretion of the officer in the field be circumscribed to some extent.

This Court further explained the theory behind requiring a quantum of at least reasonable suspicion for roving patrol stops in the case of United States v.

Martinez-Fuerte, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116. It is interesting to note that the government's argument for eliminating the reasonable suspicion for permanent checkpoints is that there are too many vehicles to personally observe, thus rendering reasonable suspicion of each vehicle an impossibility. In the instant case the government's argument is that since the desolate road is so seldom used and has been used two times in the past for smuggling, then every vehicle traveling thereon must be operated by a smuggler. The lower Court's decision is likewise in direct conflict with the principles set forth in Delaware v. Prouse, supra, and United States v. Martinez- Fuerte, supra.

Such a contention by the government is similar to the position urged by the State of Texas in the recent case of Brown

v. State of Texas, 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979) wherein it was urged that since the motorist turned into an alley in a "high crime" area, thus the motorist must have been involved in some type of suspicious activity. This Court, in rejecting such a contention and relying upon Brignoni-Ponce and Delaware v. Prouse, reiterated emphatically that officers must have reasonable suspicion based on objective facts that the particular individual is involved in criminal activity. Likewise, the lower Court's decision is in direct conflict with the principles announced by this Court in Brown v. Texas, supra.

Notwithstanding this Court's recent decision in U.S. v. Cortez and Hernandez-Loera, ____ U.S. ___, 101 S.Ct. ___, 66 L.Ed.2d 620 (1981), Petitioner emphatically urges that from the overall view of

the facts at the time of arrest, there were insufficient facts to give rise to "reasonable suspicion" to stop Petitioner's vehicle.

EVIDENCE OBTAINED BY ILLEGAL ARREST

The clear import of Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) as elaborated on by this Court in U.S. v. Brignoni-Ponce, supra, and Dunaway v. New York, supra, is that constitutionally permissible stops that may be made by an officer upon reasonable suspicion must be momentary. It is clear that regardless of what an officer calls a detention that exceeds that momentary stop, it must be supported by probable cause sufficient for the issuance of an arrest warrant.

Petitioner was restrained of his liberty for a very significant time, in all probability a minimum of 20 minutes,

before Officer Pagitt arrived at the scene of the "stop". Thereafter, Petitioner was ordered to drive to Sanderson to the local Border Patrol office, some 17 miles from the scene of the stop, and the search was then conducted by removal of the back seat of the car, thus revealing the marihuana. It was, therefore, encumbent upon Officer Pagitt to have probable cause for the arrest of Petitioner at the very moment he arrived at the scene of the stop.

Officer Pagitt did not learn any articulable facts during the period of Petitioner's detention by Border Patrol Officers Fisher and Munoz that would raise reasonable suspicion to probable cause. Petitioner consented to Officer Pagitt's search of his trunk after Officer Pagitt had arrived at the scene of the stop and had interrogated Petitioner.

It is clear that the detention of Petitioner prior to his consent to search the trunk of the automobile he was driving exceeded the momentary stop permissible under Terry v. Ohio, supra, and its progeny on reasonable suspicion, and Officer Pagitt lacked probable cause to so detain Petitioner. The marihuana was, therefore, the fruit of an illegal "arrest" and therefore not admissible in Petitioner's trial.

C.

CONFLICT WITH OPINIONS OF OTHER CIRCUITS

The Fifth Circuit by affirming Petitioner's case without opinion has created a conflict with decisions now existing in the Ninth Circuit. There are many that Petitioner could cite showing the conflict but for the sake of brevity, Petitioner would point out to this Honorable Court

that the facts in the instant case conflict directly with those in the case of United States v. Carrizoza-Gaxiola, 523 F.2d 239 (Ninth Circuit, 1975). In Carrizoza-Gaxiola, the officers stopped a vehicle on a road used for the transportation of stolen cars between Phoenix, Tucson, and Mexico, the suspected vehicle on a road used by smugglers fit the profile constructed by the officers from specific articulable facts, but the Court struck down the stopping of the defendant in that case, saying:

> "founded suspicion requires some reasonable ground for singling out the person stopped as the one who was involved."

Petitioner would respectfully request that this Honorable Court grant his Application for Certiorari in order to

eliminate the conflict of the opinions as they exist in the Ninth Circuit and the Fifth Circuit.

Respectfully submitted,

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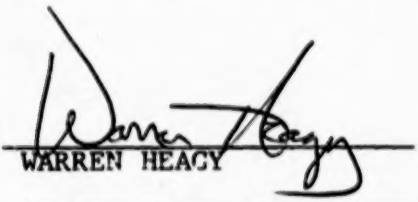
By: 
WARREN HEAGY

ATTORNEY FOR PETITIONER

APPENDIX A

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

PECOS DIVISION

UNITED STATES OF AMERICA vs.

DEFENDANT: JIMMY DELTON PETTY

DOCKET NO.: P-78-CR-69(1)

FILED: July 22, 1980

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date: July 15, 1980

WITH COUNSEL: LARRY BARBER.

PLEA: NOT GUILTY to the indictment.

There being a verdict of GUILTY at Court trial on June 26, 1980.

FINDING & JUDGMENT: Defendant has been convicted as charged of the offense(s) of

knowingly and intentionally possessed with intent to distribute a quantity of marihuana, a Schedule I Controlled Substance, in violation of 21 United States Code, Section 841(a)(1).

The Court finds that the defendant is 23 years of age at the date of conviction and is suitable for handling under the Federal Youth Correction Act, 18 United States Code, Sections 5005-5024).

SENTENCE OR PROBATION ORDER: The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for treatment and supervision pursuant to 18 United

States Code, Section 5010(b) until discharged by the Federal Youth Correction Division of the United States Parole Commission as provided in 18 United States Code, Section 5017(c).

SPECIAL CONDITIONS OF PROBATION: None.

ADDITIONAL CONDITIONS OF PROBATION: In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION: The court orders commitment to the custody of the

Attorney General and recommends, that the defendant is to remain on bond until August 4, 1980, at which time he is to contact the U. S. Marshals Office, Pecos, Texas for designation and voluntary surrender.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U. S. Marshal or other qualified officer.

SIGNED BY: s/LUCIUS D. BUNTON
U.S. District Judge

DATE: July 15, 1980

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNIT A

NO. 80-1797

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JIMMY DELTON PETTY,

Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas

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(APRIL 8, 1981)

BEFORE POLITZ, TATE and SAM D. JOHNSON, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNIT A

NO. 80-1797

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JIMMY DELTON PETTY,

Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas

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ON PETITION FOR REHEARING

(MAY 11, 1981)

Before POLITZ, TATE and SAM D. JOHNSON, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

s/Sam D. Johnson

United States

Circuit Judge

CLERK'S NOTE:

See Rule 41 FRAP and

Local Rule 17 for

Stay of the Mandate